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October 19, 2021

Chairwoman Márquez-Peterson
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

RE: Docket No. E-21160A-21-0279, In the Matter of the Application of Green Mountain Energy for a Certificate of Convenience and Necessity for Electric Generation Service

Chairwoman Márquez-Peterson,

Green Mountain Energy appreciates your letter dated September 29, 2021, and concurs with your assessment that the "[ ] Commission should not delay the timely processing of any application that is legally filed [ ]." By way of this correspondence, Green Mountain responds to several issues raised in your letter and provides additional information in support of its request that the Commission proceed in processing its Application.

Green Mountain Energy Does Not Seek a CC&N for Non-Competitive Service

In your letter you suggest that Green Mountain makes its Application under "two regulatory paths," one for "non-competitive monopolies" and the other under a competitive path. This is incorrect and we appreciate the opportunity to correct this misunderstanding. As set forth on the first page of its Application, Green Mountain seeks a CC&N to provide "competitive electric generation service in accordance with the Energy Competition Act." Nowhere in Green Mountain's Application does it request issuance of a CC&N to permit it to provide non-competitive, monopoly service in Arizona.

Green Mountain assumes the reference to "non-competitive monopolies" is a reference to Section R14-2-202. Green Mountain did provide supporting documentation called for in these Electric Utility Rules as well as the Retail Electric Competition Rules which appear at R14-2-1603. This additional information was provided in an effort to anticipate the information the Commission might need to process its Application and to be overinclusive with regard to information provided.

Administrative Rules Do Not Need to be Established Before Processing Green Mountain Energy's Application

We would like to take this opportunity to summarize Green Mountain's position. Green Mountain bases its Application on the state's Energy Competition Act contained in A.R.S. §40-202 et seq. This law makes it clear that; 1) retail competition is the law and currently certificated areas are

ACC - Docket Control - Received 10/19/2021 12:43 PM
ACC - Docket Control - Docketed 10/19/2021 1:06 PM

open to competition ***today***; 2) the Commission is the body charged with issuing certificates to competitive suppliers; and 3) the Commission is permitted, but ***is not required***, to adopt rules to help it implement the competitive structure called for in the statutes. The following is a quick review of the law supporting this analysis.

A.R.S. §40-208 provides that, "service territories established by a certificate of convenience and necessity ***shall be open to electric generation service competition*** for all retail electric customers for any electricity supplier that obtains a certificate from the commission pursuant to section 40-207." (emphasis added). As a result of this statute, there can be no ambiguity that retail electric competition is the current law in Arizona.

A.R.S. §40-207(A) in turn sets out the Commission's role providing that electricity providers "shall obtain a certificate from the Commission before offering electricity for sale to retail electric customers in this state." The Commission is, therefore, tasked with processing the Application.

A.R.S. §40-207(B) also provides that the Commission, "***may*** adopt, amend and repeal rules reasonably necessary to carry out this section." (emphasis added). Notably, this Section ***does not require*** the Commission adopt such rules in order to process applications from providers like Green Mountain and does not give the Commission the authority to delay applications in order to make any rules it may decide to adopt.[1]

In the second paragraph of your letter, you make reference to the Commission "timely processing any application that is legally filed ***under administrative rules*** that the Commission has the proper authority to use taxpayer time and resources to implement and enforce [ ]." (emphasis added). In light of the Energy Policy Act and the provisions set forth above, Green Mountain respectfully disagrees with any suggestion that the Commission need only timely process applications filed "under administrative rules." Green Mountain freely acknowledges the legal status of the Commission's Retail Electric Competition Rules is contested, but administrative rules are not necessary for the Commission to implement the Energy Competition Act.

Furthermore, the Commission routinely processes applications utilizing procedures that are not set out in any corresponding administrative rule. Indeed, filings reviewed and approved absent specific corresponding rules represent a substantial share of Commission Staff's workload.

For example, qualifying facility ("QF") contracts are reviewed and approved without any corresponding administrative rule. In fact, just like the Application at hand, the Commission processes QF contracts in accordance with laws that direct the Commission to consider such contracts. According to Commission Decision 52345, the Public Utility Regulatory Policies Act ("PURPA") requires the Commission to take certain actions, "for the encouragement of

[1] Note that to the extent A.R.S. §40-207(B) requires any rulemaking at all, the Commission was to have promulgated rules related to "disclosure and complaint procedures" prior to December 31, 1998. These rules are not needed for processing Green Mountain's Application and to the extent the Commission needs to adopt those rules, it can commence that process without delaying the processing of Green Mountain's Application.

cogeneration and small power production.[2]" The Commission has managed to comply with the provisions of PURPA despite having never promulgated rules for review of QF applications.

Further, the Commission regularly processes and considers special contract applications, including those to provide electrical service, yet the process for application and review of such contracts is found nowhere in any rule. For example, in Decision 71443, the Commission authorized SolarCity Corporation to enter a special contract with the Scottsdale Unified School District to provide two district schools with renewable electricity for a rate of between $0.09 and $0.142 per kWh.

In addition, the Commission regularly processes and reviews applications from utilities for numerous types of rate and adjuster mechanisms, using processes and procedures not set out in any rule. For APS alone, this includes six annual filings, including its Power Supply Adjustor, Tax Expense Adjustor Mechanism, Transmission Cost Adjustment Mechanism, Lost Fixed Cost Recovery Adjustor Mechanism, Environmental Improvement Surcharge Mechanism, and Transmission Cost Adjustor Mechanism—none of which are based on any Commission rule. Not only does the Commission regularly process these applications without a rule, but it even processes some applications that conflict with the rules it does have. For example, the Resource Comparison Proxy tariff for compensating solar customers was implemented under a plan of administration that even conflicts with the Commission's existing Net Metering Rules, yet the Commission processes applications from each of the state's utilities to update this tariff every year.

These examples illustrate how frequently the Commission conducts reviews and processes applications absent an administrative rule. It is clear that administrative rules are not a necessary precursor to Commission action and in light of the clear language of the Energy Competition Act, the Commission must process Green Mountain's Application. The proper course of action in this matter is for the Commission through the ALJ, who has already issued one preliminary procedural order in the Green Mountain matter [see order granting intervention, setting *ex parte* restriction], to issue a Procedural Order that respects Green Mountain's due process rights by setting a schedule for staff's review of the Application. Green Mountain is simultaneously filing a Motion for Entry of Procedural Order Setting a Schedule along with this correspondence.

The Existence of Other CC&N Applications Should Not Slow the ACC's Review of Green Mountain Energy's Application

Finally, your letter references several previously filed CC&N applications and asks your staff for a status update regarding each. No matter what the Commission does with these other applications, Green Mountain believes it is important that the Commission move forward with its Application without delay. After all, it is commonplace for the Commission to simultaneously review and process applications from numerous utilities on the same topic at the same time and we see no reason that the Commission should approach this situation any different.

We appreciate the opportunity to respond to your letter and hope we have resolved your questions. As a result of the forgoing, Green Mountain respectfully submits that the third item you propose

[2] Decision 52345, 1:25.

for inclusion on an upcoming staff meeting is not needed and is not an accurate characterization of Green Mountain's Application. Consequently, we request that item be removed from any future agenda. Further, as set forth in the attached Motion, we respectfully request that the ALJ enter a procedural order adopting the proposed procedural schedule.

Green Mountain looks forward to working with Commission and Staff to process its Application and to providing competitive electrical service to Arizonans.

Sincerely,

Court S. Rich